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No. 96-1505

In The

Supreme Court of the United States

October Term, 1996

RALPH C. BUSS,

Petitioner,

vs.

PAINESVILLE TOWNSHIP,

Respondent.

On Petition For Writ Of Certiorari To The Ohio Court Of Appeals, Eleventh Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent requests that the Court deny the Petition for Writ of Certiorari seeking review of an opinion of the Court of Appeals of Ohio for the Eleventh Appellate District. This Court of Appeals Opinion, unreported Accelerated Case No. 94-L-101, is annexed as Appendix B to the Petition for Writ of Certiorari.

The Lake County Common Pleas Court Order Granting Preliminary and Permanent Injunction (Painesville Township v. Ralph Buss, Case No. 94-CV-00643) is annexed as Appendix C to the Petition for Certiorari. (For the convenience of the Court, all citations to the Appellate Opinion and trial court Order will be referenced to the foregoing Appendices B and C attached to the Petition).

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. Section 1257(a). The constitutional question and supporting facts presented for review in the Petition are misrepresented both as to their accuracy and relevancy in the hearings and appeal before the Ohio courts. These newly presented arguments and factual misrepresentations may not be properly considered.

STATEMENT OF THE CASE

In his Petition, the petitioner has presented for this Court's consideration a constitutional question which is wholly unsupported factually by the record and, to a large extent, is newly raised.

Underlying all of petitioner's arguments and conclusions is the major premise that the Lake County Common Pleas Court and the Ohio Court of Appeals, Eleventh Appellate District, failed to apply First Amendment standards to respondent's application of its zoning resolution to petitioner's property. As a corollary, petitioner has also represented to this Court that respondent's application of its zoning resolution constituted a prior restraint on petitioner's First Amendment liberties. The record and the judgment of the trial court give no support to either of those propositions. The question presented by the petitioner, and his supporting arguments, all assume a statement of facts from evidence contorted most favorably to the petitioner and not as found by the trial court or otherwise supported by the record.

At the crux of petitioner's argument is the allegation that the application of respondent's zoning resolution proscribed free speech, free association and free assembly. Indeed, that proposition is embodied in petitioner's stated reasons for granting this writ, wherein petitioner claims that the zoning resolution application by respondent resulted in "a prior restraint of petitioner's right to express himself on his own property, to engage in political speech and to listen to music." (Petition at 8).

Respondent's application of its zoning resolution constituted action to restrain a non-permitted use within

a specific zoning classification district. The evidence elicited at trial and effectively found as fact by the trial court in its order establishes nothing more. In similar contrast to petitioner's contention that the trial court's grant of a preliminary and permanent injunction was premised on a failure to apply First Amendment standards, is the actual impact of the trial court's order, which enjoined petitioner from providing overnight camping, entertainment associated with that overnight camping, and illegal parking.

Rather than directly address the absence of the trial court's injunctive relief failing to circumvent any First Amendment right on the part of petitioner to free speech, association, assembly and expression, the petitioner has, at least for purposes of this petition, cavalierly assumed as fact the most favorable statements of evidence as if the trial court had wholly adopted the testimony of petitioner's witnesses, while entirely disregarding testimony elicited by respondent and the limited scope of its requested injunctive relief. To the contrary, the trial court was quite specific in weighing all the evidence, reaching its various conclusions, and then limiting its injunction to petitioner's illegal uses. There was no restraint whatsoever on any First Amendment activity (Petition at 22-23).

Even a casual reading of the Court of Appeals' Opinion discloses the acute factual discrepancies between the actual activities of the petitioner which were restrained by application of the respondent's zoning resolution and the contorted interpretation presented by petitioner as to his circumvented First Amendment rights. The trial court

testimony, fully reviewed in the Court of Appeals' Opinion, carefully detailed the petitioner's non-permitted use of his property for on-site overnight camping in conjunction with an off-site holiday weekend event. (Petition at 11-12), petitioner's non-compliance with respondent's parking requirements under its zoning resolution (Petition at 12), and the indisputable fact that petitioner's contemplated overnight camping is not a permitted use in the relevant district under respondent's zoning resolution (Petition at 12).

The ability of a political entity such as respondent to properly regulate land uses within its boundaries was explicitly recognized by this Court at least as early as the seminal case *Euclid v. Ambler Realty*, 272 U.S. 365 (1926). Political entities such as the respondent are granted authority both under state statute and by case law to regulate the purposes for which land may be used when the regulations are promulgated to promote the public health, safety and morals. R.C. 519.02.

Notwithstanding petitioner's attempts to superficially flavor the overnight camping prohibition and parking regulations of respondent's zoning resolution as an unconstitutional restraint upon the First Amendment by arguing that political views would be expressed and exchanged on petitioner's property, respondent in fact did not seek to proscribe any exchange of views, association or assemblage. The record below discloses that the only injunctive relief sought was to restrain petitioner's non-permitted use for overnight camping and, secondly, to insure that the relevant parking requirements for petitioner's zoning district were complied with by petitioner.

No restraint was ever requested as to any political fund-raiser. Indeed, no political fund-raiser was ever restrained.

On appeal to the Ohio Court of Appeals, Eleventh Appellate District, the petitioner sought reversal on the ground, *inter alia*, that " . . . the injunction constituted an impermissibly broad restraint on his freedom of speech, freedom of expression, freedom of association, and freedom of assembly . . . " (Petition at 14). The Eleventh District Court of Appeals reviewed the evidence, and found it sufficient to sustain the judgment of the trial court. Perhaps more importantly for purposes of this matter, the Court of Appeals determined that the scope of the injunctive relief granted only prohibited overnight camping and illegal parking. The petitioner implicitly quarrels with the Court of Appeals' determination that the trial court's injunction against overnight camping and illegal parking did not infringe on his First Amendment rights. In point of fact, the Eleventh District Court of Appeals noted the obviously narrow impact of the trial court's injunction, stating that "people could assemble on . . . [petitioner's] property to express their thoughts and to associate as long as they refrained from camping overnight on that site." (Petition at 15).

Perhaps inadvertently, the petitioner reaches the gravamen of his argument in the Petition at 6:

> A review of the trial court record shows that it *never applied* any of the above-mentioned [First Amendment] standards to determine whether respondent's regulation of petitioner's political fund-raising concerts was justified. It *failed to apply* the standards adopted by this Court for

> regulating temperate speech on private property, for enforcing a prior restraint on expression, for regulating political speech, or for regulating musical events. (Emphasis supplied).

Aside from the fact that this argument is substantively untrue, it does serve the purpose of illustrating that, despite petitioner's attempts to couch this appeal in constitutional terms, this case turns only on the fact that the trial court decision restrained overnight camping as a non-permitted use, and illegal parking. That is the sole and limited effect of the trial court's grant of injunctive relief.

This Court should not now delve into petitioner's misguided attempt to create a factual dispute as to what non-existent First Amendment activities on the part of the petitioner were restrained by the trial court's injunctive order. Factually, both lower courts found none. The deference which this Court assigns to findings of fact by the courts below is palpable. A simple statement of the Court's view of weighing the evidence and making factual determinations is found in *Norton Co. v. Dept. of Revenue*, 340 U.S. 534 (1951):

> Of course, in constitutional cases, we have power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, but that does not mean that we will re-examine, as a court of first instance, findings of fact supported by substantial evidence. 340 U.S. at 538.

The trial court Order and the more expansive Court of Appeals' Opinion, appended to the Petition, intrinsically

discloses substantial evidence to support their conclusions and judgment.

Although this Court certainly has the power to accept jurisdiction of the case at bar and to make independent factual determinations, such a result would be extremely inconsistent with prior decisions on that issue. The Court noted its usual approach to factual determinations in *Pennekamp v. Florida,* 328 U.S. 331 (1946):

> While the ultimate power is here to ransack the record for facts in constitutional controversies, we are accustomed to adopt the result of the state court's examination. It is the findings of the state courts on undisputed facts or the undisputed facts themselves which ordinarily furnish the basis for our appraisal of claimed violations of federal constitutional rights. 328 U.S. at 345.

Petitioner's factual recitation of the events and mythologized nature of what activities respondent sought to restrain differs markedly with respondent's sole and exclusive desire to preclude overnight camping and illegal parking and thereby uphold its zoning resolution.

Regarding factual review on appeal, this Court has developed the "two-court rule" pertaining to cases where the facts have been reviewed by two lower courts. A statement of the rule and its underlying policy is found in *Berenyi v. District Director,* 385 U.S. 630 (1967). The Court was asked in *Berenyi* to review and reject a factual conclusion which was reached by the trial court and which was affirmed by the appellate court. The Court refused to make the factual inquiry, noting the rule as follows:

> In order to do so, we would be forced to disregard this Court's repeated pronouncements that it 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.'
>
> The policy underlying the 'two-court rule' is obvious. This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force. 385 U.S. at 635-636.

In the case at bar, the trial court determined the facts, drew conclusions from those findings, and restrained overnight camping, entertainment associated with overnight camping and illegal parking as contrary to respondent's zoning resolution. The injunctive impact of the trial court's order did not encompass any restraint on First Amendment protected activities, nor were the existence of such activities factually in the record. This evidentiary view was affirmed by the appellate court. The two-court rule precludes any further consideration of this matter on appeal.

CONCLUSION

The Eleventh District Court of Appeals' Opinion presents no disturbance of precedent and no prior restraint or prohibition on any First Amendment rights as urged in

the unrestrained hyperbole upon which the Petition is based. While all constitutional principles are unequivocally of great importance and subject to the highest standards of judicial protection, there is simply no First Amendment issue involved for application or development in this matter. What is presented is simply a political entity's enforcement of its zoning resolution to prohibit overnight camping and illegal parking. Petitioner's arguments notwithstanding, this case does not present any substantial federal question. Petitioner's arguments all presuppose the existence of facts which either were not believed or were not found by the trial court. The decisions of the Ohio courts thus rest on an adequate non-federal basis and review should be denied. It would be strikingly inconsistent with the prior decisions of this Court to accept review, and confront petitioner's newly created factual issues.

The Writ of Certiorari should be denied.

Respectfully submitted,

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519.02 Township trustees may regulate building and land use in unincorporated territory for public purpose

For the purpose of promoting the public health, safety, and morals, the board of township trustees may in accordance with a comprehensive plan regulate by resolution the location, height, bulk, number of stories, and size of buildings and other structures, including tents, cabins, and trailer coaches, percentages of lot areas which may be occupied, set back building lines, sizes of yards, courts, and other open spaces, the density of population, the uses of buildings and other structures including tents, cabins, and trailer coaches, and the uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated territory of such township, and for such purposes may divide all or any part of the unincorporated territory of the township into districts or zones of such number, shape, and area as the board determines. All such regulations shall be uniform for each class or kind of building or other structure or use throughout any district or zone, but the regulations in one district or zone may differ from those in other districts or zones.